Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Fair Market Value

*Laura H. Burney**

I. INTRODUCTION

Perhaps the most frequently cited quotation in property cases in general, and in those grappling with estates and future interests in particular, is Justice Holmes' admonition that

> [i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[1]

The reasons behind the rules governing the compensation awarded an owner whose property has been taken have not vanished but are frequently forsaken. If the United States Supreme Court is taken at its word, the normative basis for providing just compensation in all takings cases should be the fifth amendment's dictate of fairness and indemnity.[2] Yet in answering the just compensation question, courts are plagued by the tendency to consciously sacrifice fairness and indemnity for objective standards in the name of procedural simplicity.

Just compensation is the final question in a series of queries which compose the "jurisprudence of taking."[3] The preceding

---

* Assistant Professor of Law, St. Mary's School of Law. The author would like to thank the faculty members of St. Mary's School of Law, who attended a workshop on this topic, for their helpful comments, and Nancy Farrer for her invaluable research assistance.

1. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. *See, e.g.*, United States v. 50 Acres of Land, 469 U.S. 24, 37 (1984) (O'Connor, J., concurring) (significant deviation from fifth amendment's indemnity principle is manifestly unjust); United States v. 564.54 Acres of Land, 441 U.S. 506, 513 (1979) (questioning market value as adequate to satisfy fifth amendment's indemnity standard); United States v. Fuller, 409 U.S. 488, 490 (1972) (constitutional just compensation derived from basic fairness principles); United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950) (defining just compensation through concepts of fairness and equity).

3. *See* Cribbet, *Concepts in Transition: The Search for a New Definition of Prop-*

questions are first, whether there has been a taking of private property; second, whether there is any justification for the taking which eliminates the compensation requirement , such as the police power; and, third, whether the taking is for a public use.[4] While the United States Supreme Court is still struggling to conceive a coherent doctrine for answering whether there has been a taking and whether it is compensable,[5] it has virtually eliminated the public use requirement from the analysis. However, the Court has provided a definitive answer to the just compensation question. In condemnation cases in general, the fair-market-value standard has assumed the position of the pagan god of just compensation despite the protests of heretics promoting economic efficiency and fairness.[6] The standard which has reigned supreme in compensating certain types of future interest holders, has been the Restatement's "imminency" test, although it has been displaced somewhat by a "difference-in-value" test.[7]

Future interest cases, particularly those in which a possibility of reverter has been condemned, provide a microcosm for

---

erty, 1986 U. ILL. L. REV. 1, 26 (outlining questions of governmental power limits to eminent domain).

4. *See* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 31 (1985) (developing theory of eminent domain evaluation through four sequential questions). Whether or not one agrees with his answers, Professor Epstein's delineation of the questions provides a workable analytical tool.

5. *See* First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 312-13 (1987) (accepting without review decision of California Supreme Court that requirement of grant of easement as condition to issuance of building permit constitutes taking). *See also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 836-37 (1987) (declining to specify legitimate state interests in case where state action was clearly not valid). For a discussion of the implications of these and other cases on the threshold takings question, see Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1585 (1988). For a review of the theories that the United States Supreme Court has used in the past to provide answers to these questions, see Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61 (1964).

6. *Compare* United States v. 564.54 Acres of Land, 441 U.S. at 512 (fair market value adequate general rule for balancing public need with private loss) *with* R. POSNER, ECONOMIC ANALYSIS OF LAW 51 (3d ed. 1986) (economic efficiency able to account for all necessary costs of compensation); Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 572, 582-99 (1984) (economic efficiency approach balancing benefits and costs of compensation); Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1278-79 (1985) (market value not adequate to prevent inefficient government action); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1172 (1967) (fairness as single test for correct compensation); and Sax, *supra* note 5, at 57 (fairness constraining arbitrary governmental abuses).

7. *See infra* text accompanying notes 62-81.

viewing how overemphasizing objective standards compromises the effectiveness of just compensation as a deterrent to governmental abuses of private property.[8] The just compensation requirement has been firmly cast in this deterrence role by the newly-neutered status of the public use requirement. Compensation will work as an effective deterrent, however, only when courts are freed from the shackles of predetermined standards and extend their grasps to the equities of each case.

The purpose of this article is to demonstrate the general inappropriateness of strictly adhering to any one predetermined standard in compensating owners whose property has been taken. Holmes' admonition is appropriate in this instance not because the reasons behind the standards have vanished, but because the courts, "from blind imitation" of these objective standards, have strayed from their reason for being. That reason is the just compensation requirement in the fifth amendment.[9] Section II of this article compares United States Supreme Court opinions with other approaches to determine when, in general, compensation is "just" compensation.[10] The purpose of this section is to urge that just compensation be equated with the fifth amendment's dictate of fairness and indemnity rather than with any one objective standard. Section III analyzes the rules the Restatement of Property and the courts have provided for de-

---

8. Regardless of its exact historical grounding, deterrence is definitely a function of just compensation. *See* R. POSNER, *supra* note 6, at 51. Posner states:

> A straight forward economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power. If there were no such requirement, the government would have an incentive to substitute land for other inputs that were socially cheaper but more costly to the government.

Id. See also Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 44 (purpose of takings clause to discipline government excesses). Professor Sax labeled the view of just compensation as a mandate that economic values be maintained against government diminution as one of the abiding myths of American constitutional law. *See generally* Sax, *supra* note 5, at 54. *But see* Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 586 (1972) (criticizing Sax's conclusions on the purpose of just compensation). For an historical review of the just compensation requirement, see Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

9. U.S. CONST. amend. V (requiring due process and just compensation for deprivation of property). The fifth amendment states in part: "nor shall private property be taken for public use, without just compensation." *Id.* This takings clause has been held applicable to the states through the fourteenth amendment. *See* Chicago B & Q R.R. v. City of Chicago, 166 U.S. 226, 235-36 (1897) (takings procedure alone insufficient to satisfy due process under fourteenth amendment without compensation).

10. *See infra* text accompanying notes 13-52.

ciding how a future interest holder should be compensated.[11] The rules governing compensation for an owner of a possibility of reverter are emphasized throughout, since they represent the most egregious departure from the constitutional dictate. This section presents the condemnation of fee simple determinables as representative of the objective standards' failure in determining just compensation in all takings cases and proposes restructuring this approach by dethroning objective standards and emphasizing the equities of each case. Section IV reviews a recent article by Professors Goldberg and Merrill, and Daniel Unumb in which they support a "default rule" which gives the entire condemnation award to the grantee of a fee simple determinable thereby denying the owner of the possibility of reverter any compensation.[12] Section IV takes issue with their support of this rule and demonstrates that, despite their indications to the contrary, *ex ante* clauses could work effectively in a deed granting a fee simple determinable.

II. The Increased Importance Of Just Compensation In Deterring Governmental Abuse Of Private Property

The most recent Supreme Court case to have considerable impact on just compensation awards addresses the public use question. In *Hawaii Housing Authority v. Midkiff*,[13] the Court effectively eliminated the public use requirement from takings analysis by broadening the scope of governmental actions constituting a public use. The Court held that this requirement is "coterminous with the scope of a sovereign's police powers" and emphasized judicial deference to legislative determinations.[14] After *Midkiff*, it is unlikely that a governmental action will ever be struck down as violative of the public use requirement.[15] There-

11. *See infra* text accompanying notes 53-126.

12. *See infra* text accompanying notes 127-142.

13. 467 U.S. 229 (1984).

14. *Id.* at 240-41. *Midkiff* involved the constitutionality of the Hawaii Land Reform Act of 1967, which allowed lessees to request that the state condemn real property from lessors of single family tracts containing at least five acres. After condemnation, the state could sell portions of the tracts to the lessees. *Id.* at 233-34. The Act's purpose was to break up large estates because "concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare." *Id.* at 232.

15. Even before *Midkiff*, the public use requirement had been interpreted very broadly. *See e.g.*, Berman v. Parker, 348 U.S. 26 (1954). In that case, the Supreme Court found an eminent domain action constitutional even though most of the land taken was to be sold to private individuals. *Id.* at 33. Another blatant example of the early frustra-

fore, just compensation now stands as virtually the only judicial safeguard against governmental interferences with private property that cannot be justified under the police powers.[16]

A. The Meaning of Just Compensation

The Supreme Court's opinions are replete with notions of "fairness" and "indemnity" as the standards for deciding if a condemnee has been justly compensated. For example, in a 1973 case, then-Justice Rehnquist stated that "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law."[17] The Court has indirectly approved an indemnity standard for decades by reiterating the following phrase from *Olson v. United States*:[18] "[An owner of property] is entitled to be put in as good a position pecuniarily as if his property had not been taken."[19]

Although the Court has also directly recognized that the indemnity principle is inherent in the just compensation requirement, it has simultaneously admitted that this principle "has not been given its full and literal force."[20] The reason given for permitting deviations from this standard is the "need for a relatively objective working rule."[21] The working rule which has been adopted is the fair market value of the property taken.

1. The meaning of fair market value

Fair market value is purported to be what a willing seller would pay and a willing buyer would accept,[22] yet there are

---

tions encountered in asserting the public use requirement is City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982), *cert. denied*, 478 U.S. 1007 (1986). The California Supreme Court stated that the acquisition and operation of a sports franchise could be a public use. *See id.* at 70-73, 646 P.2d at 841-43, 183 Cal. Rptr. at 679-81.

16. *See* Durham, *supra* note 6, at 1284 (discussing just compensation as the only remaining check after *Midkiff*).

17. United States v. Fuller, 409 U.S. 488, 490 (1973) (citation omitted). *See also* United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950) (just compensation equated with concepts of fairness and equity).

18. 292 U.S. 246 (1934).

19. *Id.* at 255. *Accord*, United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979) (quoting the *Olson* standard of indemnity).

20. United States v. 564.54 Acres of Land, 441 U.S. at 511 (noting practical difficulties in achieving desired fifth amendment requirements).

21. *Id.* (adopting fair market value as workable objective rule).

22. *See, e.g.*, United States v. Virginia Electric and Power Co., 365 U.S. 624, 633

many values, such as good will, lost profits, and sentimental attachment, that have been labeled "speculative" and "non-transferable" and are therefore omitted from a determination of fair market value,[23] regardless of the role they might actually play in an open-market transaction.[24]

The Court has recognized that there will be situations in which fair market value may not be appropriate. These situations have been defined as those in which "market value has been too difficult to find, or when its application would result in manifest injustice to owner or public."[25]

Recently, in *United States v. 50 Acres of Land*[26] ("*Duncanville*"), the city of Duncanville, Texas argued that fair market value was not an appropriate standard for compensating a public condemnee.[27] Instead, the city asserted that the basic indemnity principle in the just compensation clause could only be satisfied by awarding the cost of substitute facilities.[28] Nonetheless, the *Duncanville* court concluded that the risk of a "windfall" to the city existed and that there was no need to depart from the objective fair-market-value standard.[29] In her concurrence, Justice O'Connor opined that the city had not established that "market value in this case deviated significantly from the

---

(1961) (reimbursement determined by price willing buyer would pay willing seller); United States v. Miller, 317 U.S. 369, 374 (1943) (market value equaling cash value from willing buyer to willing seller); City of New York v. Sage, 239 U.S. 57, 61 (1915) (market value determined by what purchaser would in fact pay under normal conditions).

23. *See, e.g.*, United States v. 564.54 Acres of Land, 441 U.S. at 514 (non-transferable values such as owner's special need for land not compensable); United States v. Commodities Trading Corp., 339 U.S. 121, 126 (1950) (retention value not normally a factor in calculating current compensation requirement); Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949) (loss of non-transferable values treated as part of the burden of citizenship). *See generally* 3 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 8.61 (rev. 3d ed. 1985) (remote and speculative values not considered in determining compensation); 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 14 (2d ed. 1953) (non-transferable loss due to personal need or sentiment not compensable).

24. For example, in United States v. Fuller, 409 U.S. 488 (1973) the Court held that fair market value need not include value added due to the proximity of the tract to adjacent federal lands in which the condemners held permits since the government created the interests. *Id.* at 493. *But see* Almota Farmers Elevator & Warehouse v. United States 409 U.S. 470 (1973) (value of expectation of lease renewal figured in fair market value).

25. United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).

26. 469 U.S. 24 (1984).

27. *See id.* at 26 (claiming cost of replacement site and facilities).

28. *See id.* (asserting higher compensation award needed because of city's duty to replace condemned public facility).

29. *See id.* at 34 (increased value of new facilities as much a windfall as unused compensation).

indemnity principle. . . ."[30] *Duncanville* derived support from *United States v. 564.54 Acres of Land*[31] (*"Lutheran Synod"*), a case decided five years earlier. The *Lutheran Synod* Court ruled that a private condemnee was justly compensated by application of the fair-market-value standard even though the condemned property could only be replaced with more expensive substitutes.[32] The "fear" in that case was that the condemnee would receive a "windfall" if substitute facilities were never purchased or, if purchased, were subsequently sold.[33]

What then is just compensation? The rhetoric of the Supreme Court cases can be assimilated to produce the following elusive answer: just compensation is the fair market value of the property taken (as determined pursuant to the court's constrained definition of that term) unless it can be shown not simply that such an award fails to fully indemnify the owner, but that it fails to indemnify to such an extent that it is very unfair.

2. *The meaning of fairness*

The *Duncanville* and *Lutheran Synod* cases indicate that the Court's definition of fairness would lead circuitously back to the question-begging answer formulated above: fair market value is fair unless it is very unfair. These opinions do, however, suggest using certain criteria, oblique as they may be, to determine when an award based on fair market value is fair. First, the fair-market-value standard is deemed fair if using some other standard increases the possibility that the condemnee would receive a "windfall."[34] Second, another standard must be used if using the fair-market-value standard will produce "manifest injustice."[35] This latter criterion has not been defined although it appears that the two criteria are mutually exclusive. In other words, if there is a possibility of a windfall to the condemnee,

---

30. *Id.* at 37 (O'Connor, J., concurring) (indemnity principle requiring just compensation proof on case-by-case basis).

31. 441 U.S. 506 (1979).

32. *See id.* at 514-17 (full indemnity does not require compensation for unique needs which cause higher replacement costs).

33. *See id.* at 516 (only speculation that similar facilities would be acquired and maintained).

34. *See Duncanville*, 469 U.S. at 34-36 (fair market value proper as objective standard preventing compensation for subjective values).

35. *See Lutheran Synod*, 441 U.S. at 512-13 (market value inappropriate where result is substantial deviation from fifth amendment principles).

fair market value will not be considered manifestly unjust and the fair-market-value standard will be deemed fair.

It is not surprising that the Court has consistently fallen back on the fair-market-value standard rather than attempt to define fairness more articulately. As Professor Michelman noted in his seminal article on just compensation, "fairness resists being cast into a simple, impersonal, easily stated formula."[36] Courts and scholars, realizing this, tend to emphasize formulas rather than fairness in determining just compensation.

3. *The government's susceptibility to "fiscal illusion"*

Law and economic theorists maintain that economic efficiency provides an accurate and manageable formula for determining just compensation.[37] Economic efficiency requires weighing an action's costs against its benefits.[38] Economic efficiency is

---

36. Michelman, *supra* note 6, at 1250. Michelman concludes:

> We should not be surprised at the emergence of a number of partial, imperfect, or over broad surrogate rules from among which judges may pick and choose in order to avoid explaining compensability decisions in terms by which a litigant is, in effect, simply told that his sensation of having been victimized is not justified.

Id. at 1249.

37. *See* Blume & Rubinfeld, *supra* note 6, at 571, 610 (adopting goal of economic efficiency as framework for evaluation of compensation). *See also* Durham, *supra* note 6, at 1301 (efficient just compensation obtained by reducing cost/benefit analysis to uniform formula). *See generally* R. POSNER, *supra* note 6, at § 3.6 (discussing economic analysis of compensation questions in eminent domain actions).

38. *See* A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (2d ed. 1989) (defining efficiency). Polinsky labels this concept of efficiency as "more intuitive" than other technical concepts such as Pareto optimality. *Id.* at 7 n.4. A thorough examination of these various concepts of economic efficiency is beyond the scope of this article since the premise presented is that uniformly equating just compensation with efficiency falls short of the fifth amendment's fairness dictate due to the inability to value all factors present in each takings case. *See, e.g.*, Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 388-89 (1981) (criticizing proponents of economic efficiency for failing to recognize moral judgments inherent in their supposedly objective calculations); Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 307, 309 (1979) (certain important goods and services have no measurable objective value in terms of market pricing); Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 644-47 (1980) (simplified models of efficiency ignore non-monetizable social and moral variables). *But see* G. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 6-14 (1976) (illustrating economic method of calculating prices of non-market commodities such as health, marriage, children, political choice, etc.); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119-20 (1979) (economic analysis based on value of each aspect of society expressed in dollars or dollar equivalents). If Posner recognizes that certain behaviors may be outside the scope of his calculations, he submits that any workable theory of analysis must necessarily be more simplistic than real life. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757,

achieved when benefits outweigh costs. A particular taking would only be efficient when the governmental entity included all the costs of its eminent domain action in its cost/benefit analysis for the specific project.[39]

The ability to ignore certain costs under the Court's definition of fair market value renders the government susceptible to operating under a "fiscal illusion."[40] This theory suggests that governmental entities will make inefficient taking or regulatory decisions because they have been permitted to externalize costs rather than required to include them in their budgetary outlay.[41] The ripple effect of this result is that the political process, like the public use requirement, is no longer an effective check on takings decisions.[42]

The Supreme Court's retort to the fiscal illusion phenomenon would predictably be the same given in response to attacks upon the appropriateness of the fair-market-value standard as the measure of just compensation. That answer has been that such inequities are tolerated because of the need for a "workable measure of valuation," which strikes a "fair balance between the public's need and the claimant's loss."[43] The fallacy of this re-

---

773-74 (1975). For an explanation and discussion of the various concepts of efficiency, see R. POSNER, *supra* note 6, at § 1.2.

39. *See generally* Durham, *supra* note 6, at 1278 n.5 (economic efficiency equated with cost versus benefit analysis). Professor Durham concludes that only costs that are "large, fairly concrete, and roughly monetizable" should be included in the computation of just compensation. *Id.* at 1302.

40. *See* Blume & Rubinfeld, *supra* note 6, at 620 (regulatory decisions influenced by attempts to avoid monetary expenditures). Blume and Rubinfeld discuss fiscal illusion as a factor for determining when compensation should be made. *See id.* at 621 (compensation correcting fiscal illusion by requiring budgetary outlay). Professor Durham uses fiscal illusion to demonstrate the ineffectiveness of the fair-market-value standard as the measure of just compensation. *See* Durham, *supra* note 6, at 1300-01. Durham notes:

> Measuring just compensation by the market value of the property taken greatly increases the probability that a government's eminent domain action will be inefficient. Because the government is not accountable for all the costs of the taking, "fiscal illusion" may cause underestimation of costs and fail to deter if not induce inefficient actions.

Id. (footnotes omitted). *But see* Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 511, 567-68 & nn. 167-69 (1985) (fiscal illusion is an improper governmental assumption that disregards costs more than benefits).

41. *See* Blume & Rubinfeld, *supra* note 6, at 621 (monetary accountability as prerequisite to socially responsible decision-making).

42. *See* Durham, *supra* note 6, at 1293-97 (takings motivated by political self-interest and ability to ignore social costs by both officials and voting public).

43. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 511-12 (1979) (market value as tool to balance public and private needs); *see also* United States v. 50 Acres of Land, 469 U.S. 24,33 (1984) (market measure achieves balance between public need and

tort is that it places the emphasis on valuation rather than fairness and indemnity. The weakness of the economic efficiency equation for just compensation stems from this same imbalance since there are many costs which are not sufficiently monetizable to be included in the computation.[44] Demoralization costs are one example.

4. *Demoralization costs*

Professor Michelman used demoralization costs as part of a utilitarian formula for answering the initial question about whether a compensable taking has occurred, but the concept has relevance to the just compensation question as well.[45] Michelman's inquiry was "what criteria of compensability will emerge if the practice of compensating is taken to have the purpose of quieting people's unease about the possibility of being strategically exploited[.]"[46] Michelman also recognized that it

---

private loss). Calabresi and Melamed have explained that this balance is maintained through application of an objective fair-market-value standard, which recognizes that it may not fully indemnify, because eminent domain involves application of liability rules, rather than property rules, to achieve distributional as well as efficiency goals. *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1110 (1972). A property rule, unlike a liability rule, involves transferring entitlements in a voluntary transaction complete with the strategic behaviors usually exerted by buyers and sellers in an open-market transaction. *See id.* at 1106-07. If, as the Court enunciates, just compensation should reflect what a willing buyer and seller would agree upon, then it follows that property rules rather than liability rules should govern. The justification for adopting a liability rule instead is that given the market and its concomitant transactional costs, the government could not afford to pursue many, if not most, of its distributional goals. *See id.* at 1108-10. The response that most scholars have given to this fact is that if the government cannot afford to pay, it cannot afford to act. *See generally* Durham, *supra* note 6, at 1312-13 (requiring government to bear costs reinforces fifth amendment protection); Michelman, *supra* note 6, at 1181 (absent full compensation society cannot act). Professor Epstein agrees that distributional goals should not be involved in takings decisions. *See* R. EPSTEIN, *supra* note 4, at 112 (police power not encompassing redistribution of benefits without compensation).

44. *See supra* note 38 and accompanying text.

45. *See* Michelman, *supra* note 6, at 1213 (compensation required where activity would otherwise be critically demoralizing). Michelman notes:

> "Demoralization costs" are defined as the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.

Id. at 1214 (footnote omitted).

46. *Id.* at 1217 (systematic exploitation more demoralizing than everyday risk of

would be difficult to place a value on demoralization costs.[47] Yet, as this article will demonstrate, the uniform exclusion of these costs in the abstract permits compensation to unnecessarily fall short of the constitutional dictate by allowing real opportunities for "strategically exploiting" property owners.

B. Practically Achieving Just Compensation

This article does not suggest that an amorphous approach giving consideration to all possible variables in determining fairness and indemnity would be acceptable for determining the first three questions in the takings analysis.[48] Once the taking for public use determination is made, the fairness and indemnity dictate of the fifth amendment would best be served if the compensation question were submitted to the fact finder with appropriate instructions.[49] If juries are permitted to decide questions as nebulous as mental anguish and pain and suffering, they should be allowed to determine a "fair" condemnation award. The evidence should include facts bearing upon, *inter alia*, efficiency,[50] the fiscal illusion phenomenon, demoralization costs, and fair market value.[51] This approach would transfer the emphasis from valuation to fairness and indemnity which would restructure the just compensation requirement into a more effec-

---

accident).

47. *See id.* at 1215 (acknowledging even the victim may be unable to value subjective losses like security and incentive). Professor Durham concludes that since demoralization costs are not sufficiently monetizable, they should be excluded from just compensation. *See* Durham, *supra* note 6, at 1303-04.

48. *See supra* text accompanying notes 3-4; Epstein, *supra* note 8, at 4 (criticizing lack of 'set formula' for determining when taking has occurred).

49. *See* CAL. CIV. PROC. CODE § 1263.320(b) (Deering 1981) (property without relevant market to be valued by any just and equitable method).

50. This means evidence on the aggregate costs and benefits of the eminent domain action.

51. *See, e.g.*, State v. Munson, 174 So. 2d 923, 925 (La. Ct. App. 1965) (appraisals ranging from $2,750 per acre to $10,457 per acre); State v. Frisby, 260 Minn. 70, 73-74, 108 N.W.2d 769, 771-72 (1961) (appraisals divergent enough to support award of $1,750 on damage claim of $10,000); Linzell v. Ohio Nat'l Bank, 101 Ohio App. 17, 20, 137 N.E.2d 520, 522 (Ct. App. 1956) (expert appraisals ranging from $65,400 to $154,790). *See generally* Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 73 (1957) (surveys showing appraisal variances ranging from 56% to over 500% even among objective state appraisers). *See, e.g.*, FLA. STAT. ANN. § 73.071 (West 1987) (compensation for business over five years old); TENN. CODE ANN. §§ 13-11-105 to -107 (1987) (award for relocation expenses); VA. CODE ANN. §§ 25-239 to -241 (1985) (relocation and home acquisition compensation).

tive safeguard against governmental abuses of private property.[52]

Analyzing the rules governing the compensation awarded future interest holders provides empirical evidence of the unfairness which emanates from strictly adhering to any one objective standard. Even if it is maintained that the initial application of the fair-market-value standard does not contradict notions of fairness and indemnity to the extent that the Supreme Court would find that the just compensation clause has been abridged, using that standard to determine the allocation of the award among the owners of the present and future estates does contravene the fifth amendment's just compensation mandate in certain instances. Use of the fair-market-value standard subjects owners of some future interests to a double dosage of the inequities that even the Court has recognized are implicit in equating just compensation with an objective fair-market-value standard since this standard is used to determine both the value of the undivided fee and then the separate interest of the present and future estate. The fiscal illusion phenomenon and the significance of demoralization costs are illustrated by the unique facts of *Leeco Gas & Oil Co. v. County of Nueces*, a Texas future interest case set forth in the next section. A review of the various types of future interests and the allocation they receive in condemnation actions illustrates that "blind imitation" of objective standards unnecessarily sacrifices fairness and indemnity in favor of procedural simplicity.

III. Prevailing Standards For Compensating Future Interest Holders

There are five future interests which can be created in a grant of a present interest in real property. Reversions, possibilities of reverter, and powers of termination are future interests

---

52. *See* United States v. Miller, 317 U.S. 369, 373-74 (1943) (theoretically, indemnity measured on case-by-case basis). The Supreme Court has recognized that the facts of each case should determine just compensation, but the interposition of the fair-market-value standard detracts from this emphasis. *See id.* at 374 (necessary assumptions in market valuation disregard finer elements of true value). The Court stated:

> It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value.

Id. at 373-74.

which a grantor retains when he grants a life estate, a fee simple determinable, and a fee simple subject to a condition subsequent, respectively.[53] Remainders are future interests created in third parties following the grant of a life estate, and executory interests are future interests created in third parties following the grant of a defeasible fee.[54]

A. Current Compensation Rights Of Owners Of Reversions And Remainders

Courts and legislatures have consistently recognized that the owners of reversions and remainders, whether vested or contingent, are entitled to share in a condemnation award based on the fair market value of the entire fee, although the method of compensation has varied. One approach places a monetary value on the life estate through the use of mortality tables and then awards the balance to the reversioner or the remainderman.[55] Another frequently used method places the award in trust paying the life tenant the interest and giving the reversioner or remainderman the principal upon the life tenant's death.[56] If the

---

53. *See* T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 56-62 (2d ed. 1984) (discussing future interests created or retained by grantors). *See also* L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 17-19, 28-32 (2d ed. 1984) (defining and explaining future interests in grantors). A power of termination is often used synonymously with a right of re-entry. *See generally* L. SIMES, *supra*, at 31 (right of grantor more accurately termed a power); RESTATEMENT OF PROPERTY § 24 comment b (1936) (power of termination is a more accurate description).

54. *See* T. BERGIN & P. HASKELL, *supra* note 53, at 62-66 (defining rights of third parties with future interests); *see also* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 110 (1962) (distinguishing remainders and executory interests in third parties).

55. *See* 4 P. NICHOLS, *supra* note 23, at §§ 12.46 - 12.46[1] (discussing development of actuarial data to value life estate). "Generally it may be said that in effecting such apportionment a vested remainderman is entitled to the difference between the market value of the undivided fee and the present value of the life estate." *Id.* at § 12.46[2] (footnotes omitted). *See also* Browder, *The Condemnation of Future Interests*, 48 VA. L. REV. 461, 468-69 (1962) (discussing valuation and award of each interest). The Uniform Eminent Domain Code calls for valuing the respective interests of the life tenant and remainderman. *See* UNIFORM EMINENT DOMAIN CODE § 1015 (1974). Other state statutes call for determining the respective values of the life tenancy and reversion or remainder. *See e.g.*, ALA. CODE § 35-4-190 (1977) (court determines present value of life estate giving excess award to remaindermen); CAL. CIV. PROC. CODE § 1265.420 (Deering 1981) (court option to distribute award based on respective values of life tenancy and remainder interest); MICH. COMP. LAWS ANN. § 213.188 (West 1986) (MICH. STAT. ANN. § 8.78 (Callaghan 1984)) (jury shall determine appropriate compensation for owners of any interest).

56. *See* MASS. ANN. LAWS ch. 79, § 24 (Law. Co-op 1978) (entire award placed in trust with annual income to life tenant and principal to remaindermen upon termination). *See also* CAL. CIV. PROC. CODE § 1265.420(c) (Deering 1981) (court option to hold compensation in trust). If the remainder is contingent, this method is more appropriate

land is already subject to a trust, this method is obviously the most logical, but a pre-existing trust has not been considered a prerequisite.[57] An additional but less popular solution is to use the condemnation award to buy a tract similar to the one that was condemned and impose the same interests.[58]

B. Current Compensation Rights of Holders of Possibility of Reverter, Power of Termination and Executory Interests

Unlike the owners of remainders and reversions, the owners of the other three types of future interests have not been perceived as being necessarily entitled to share in the condemnation award or to have their interest protected in any manner.[59] One view relies on the falsehood that the interests do not constitute estates in land and therefore the constitutional mandate does not apply.[60] Perhaps the most popular justification has been that

---

since the future interest holder may or may not have been entitled to a present interest in the property. Therefore, a valuation prior to the life tenant's death would be impossible.

57. *See* United States v. 122,000 Acres of Land, 57 F. Supp. 421, 422 (N.D. Tex. 1944) (court duty to preserve interests of remaindermen by supervising investment and preservation of condemnation award). The court commented:

> The thought is, that both the life tenant and the remainderman have rights which cannot be distributed by the conversion of the land into money. Prior to a sale, the life tenant has only the right to use the land. After sale, he has only the right to the use of his interest in the proceeds. But both before and after sale, the remainder interest has a right to the corpus, or, substitute principal, undiminished.

Id. at 423. *See also* CAL. CIV. PROC. CODE § 1265.420(c) (Deering 1981) (listing optional arrangement designed to preserve interests of both life tenant and remainderman). *See generally* UNIFORM EMINENT DOMAIN CODE § 1015 (1974) (providing alternative arrangements to preserve interests of life tenant and remainderman).

58. *See* United States v. 380 Acres of Land, 47 F. Supp. 6, 7 (W.D. Ky. 1942) (court-ordered proceeds to be reinvested in other suitable real estate in which parties retain same interests as before condemnation). *See* Stoyles, *Condemnation of Future Interests*, 43 IOWA L. REV. 241, 256 (1958) (advocates reinvesting compensation in similar property). *But see* L. SIMES, *supra* note 53, at 117 (uniqueness of land and limitations on court authority calling practicality of reinvestment into question).

59. The remaining three future interests are more frequently than not treated together by courts and commentators since their differences are not considered significant enough to warrant separate treatment. *See* Fifer v. Allen, 228 Ill. 507, 81 N.E. 1105, 1109 (1907) (executory interest not present estate but expectancy based on happening of future event). *See generally* L. SIMES, *supra* note 53, at 25-32 (executory interest, possibility of reverter, power of termination all arise at termination of determinable fee).

60. *See, e.g.*, City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 30, 178 S.E.2d 601, 604 (1971) (possibility of reverter not an estate in land); Chandler v. Jamaica Pond Aqueduct Corp., 125 Mass. 544, 547 (1878) (holder of possibility of reverter not person with property entitled to damages). *But see* Lawson v. State, 107 Wash. 2d 444, 457-59, 730 P.2d 1308, 1315-16 (1986) (recognizing reversionary interests

possibilities of reverter, powers of termination and executory interests are "too remote and speculative" to be capable of valuation and therefore the entire award should go to the defeasible fee owner.[61]

1. The Restatement's view of compensating future interests holders

In 1936 the Restatement of Property promulgated rules designed to relieve some of this unfairness.[62] The Restatement specifically calls for valuing the estate as if it were an "estate in fee simple absolute."[63] Thus, pursuant to Supreme Court dictates, the unrestricted fee's fair market value would determine the amount of the total award. The purpose of the Restatement rules is to aid in deciding how this award should be allocated between the owners of the defeasible fee and the future interest. Unfortunately, these rules simply perpetuate the sin inherent in earlier justifications denying compensation to owners of possibilities of reverter, powers of termination and executory interests. The Restatement's rules provide that a possibility of reverter or power of termination has no value and therefore is not entitled to any compensation unless the condition requiring reversion to the grantor or his heirs is "imminent."[64] This imminency test has proved elusive.[65] If the event is imminent, the

---

as estates in land because owner of the interest gets possession of fee upon breach of condition).

61. *See, e.g.*, Romero v. Department of Pub. Works, 17 Cal. 2d 189, 196, 109 P.2d 662, 665 (1941) (reversionary interest of no compensable value prior to breach); Fifer v. Allen, 228 Ill. 507, 521, 81 N.E. 1105, 1109 (1907) (court's refusal to protect executory interest as mere expectancy); Erie Ry. v. State, 38 A.D.2d 463, 466, 330 N.Y.S.2d 700, 703 (App. Div. 1972) (possibility of reverter too remote to support compensation award). *See generally* 29A C.J.S. *Eminent Domain* § 199 (1962) (discussing general rule disallowing compensation for reversionary interests). For a discussion of the various reasons owners of possibilities of reverter have been denied compensation, see Browder, *supra* note 55, at 473 (listing traditional reasons to avoid compensation for reversionary interests); Stoyles, *supra* note 58, at 247-53 (judicial reasons justifying non-compensation); Note, *Compensation for Possibilities of Reverter and Powers of Termination Under Condemnation Law*, 20 HASTINGS L.J. 787, 788 (1969) (court positions refusing compensation for possibilities of reverter).

62. *See* RESTATEMENT OF PROPERTY § 53 (1936) (rules governing valuation and distribution of condemnation awards).

63. *Id.* comment a.

64. *See id.* comments b & c (holder of future interest not entitled to share unless condition probably will occur within reasonably short time).

65. In Chew v. Commonwealth, 400 Pa. 307, 312, 161 A.2d 621, 623-24 (1960), the court found the terminating event was imminent since the property was owned for railroad purposes and the railroad had applied for permission to abandon. However, in Peo-

Restatement provides for making an allocation in proportion to the value of the future and present interests.[66]

Most courts follow the Restatement's test, resulting in the denial of compensation to the future interest owner in the vast majority of cases.[67] Its rules have also been occasionally com-

---

ple v. City of Fresno, 210 Cal. App. 2d 500, 517, 26 Cal. Rptr. 853, 863 (Dist. Ct. App. 1962), the court found no imminence although the city had adopted a master development plan which indicated that the property could be used as a highway. *See also* Carter v. New York Cent. R.R., 73 N.Y.S.2d 610, 613 (App. Div.) (no imminence even though railroad had requested permission to abandon), *aff'd*, 273 A.D. 884, 77 N.Y.S.2d 265 (App. Div. 1947), *aff'd*, 298 N.Y. 540, 80 N.E.2d 671 (1948); Leeco Gas & Oil Co. v. County of Nueces, 716 S.W.2d 615, 618-19 (Tex. Ct. App. 1986) (no imminence even though county plans included uses violating property restrictions), *rev'd*, 736 S.W.2d 629 (Tex. 1987). *But see* United States v. 2,184.81 Acres, 45 F. Supp. 681, 684 (W.D. Ark. 1942) (court determination that terminating event on a grant for school purposes was imminent since school district sought dissolution). Although the Restatement only provides that an award should be divided according to the proportionate values of the present and future estates, the district court ruled that the future interest holder should be awarded the value of the land and the present estate owner the value of the buildings it placed on the lands, less salvage value if the buildings could be removed. *See id.* at 684-85. *See also* Lawson v. State, 107 Wash. 2d 444, 456-57, 730 P.2d 1308, 1315 (1986) (found imminence where statute changed use of property from railroad right of way to other public use).

66. *See* RESTATEMENT OF PROPERTY § 53, comment c (distribution if event imminent). The Restatement declares:

> If, viewed from the time of the commencement of an eminent domain proceeding, and not taking into account any changes in the use of the land sought to be condemned which may result as a consequence of such proceeding, the event upon which a possessory estate in fee simple defeasible is to end is an event the occurrence of which, within a reasonably short period of time, is probable, then the amount of damages is ascertained as though the estate were a possessory estate in fee simple absolute, and the damages, so ascertained, are divided between the owner of the estate in fee simple defeasible and the owner of the future interest in such shares as fairly represent the proportionate value of the present defeasible possessory estate and of the future interest.

Id.

67. *See e.g.*, United States v. 726.23 Acres of Land, 746 F.2d 1363, 1365 (8th Cir. 1984) (award proper only where possibility of reverter imminent); Midwestern Developments., Inc. v. City of Tulsa, 374 F.2d 683, 688 (10th Cir. 1967) (no compensation due where reversion not imminent); United States v. 808.40 Acres of Land, 372 F. Supp. 1165, 1166 (E.D. Ky. 1973) (event triggering right of reverter not sufficiently imminent to support award); People v. City of Fresno, 210 Cal. App. 2d 500, 517, 26 Cal. Rptr. 853, 863 (Dist. Ct. App. 1962) (no evidence of imminency to satisfy award); City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 33, 178 S.E.2d 601, 606 (1971) (no value ascertainable where reversion not probable within short period). For a listing of earlier cases following the Restatement and refusing to award compensation to owners of reversionary interests, see Browder, *supra* note 55, at 472 n.35. *See supra* note 65 for cases in which the future interest owner was permitted to share in the award due to a finding of imminency. One law review note cites three early cases as being additional cases in which the future interest owner was allowed to recover. *See* Note, *Compensation for Possibilities of Reverter and Powers of Termination Under Condemnation Law*, 20 HASTINGS L.J. 787 (1969) (citing *Crowl v. Tidman*, *Pedrotti v. Marin County*, and *Lan-*

bined with other justifications when a court rules that the owner of the defeasible fee is entitled to the entire award. For example, some courts conclude that the fee owner should prevail because the eminent domain action excused compliance with the reverting clause.[68] One court determined that the owner of the defeasible fee should not be "penalized" for the government's action.[69] Several cases have focused on the parties' intent in ruling both for and against the right of the future interest holder to recover.[70] All of these condemnation cases consistently lack a direct focus on whether the allocation of the initial award satisfies the just compensation requirement of the fairness and indemnity dictates of the fifth amendment.

2. *Alternatives to the Restatement's approach*

a. The difference-in-value approach. State v. Independent School District[71] is one of the only cases to expressly find dissatisfaction with the Restatement rules because of its failure to comply with the just compensation requirement. Although the

---

caster School Dist. v. Lancaster County). However, a close reading of these cases reveals that the future interest owner was allowed to recover due to exceptional circumstances. *Pedrotti*, for example, involved a clause in the deed. See Pedrotti v. Marin County, 152 F.2d 829, 831 (9th Cir. 1946) (condemnation was transfer of property triggering failure of trust), *cert. denied*, 328 U.S. 853 (1946). In *Crowl*, the condition had already occurred. *See* Crowl v. Tidnam, 198 Okla. 650, 651, 181 P.2d 549, 551 (1947) (sole issue being ownership where railroad abandoned purposes specified as condition for possession). And in *Lancaster*, it is unclear whether the grant actually created a fee simple determinable. *See* Lancaster School Dist. v. Lancaster County, 295 Pa. 112, 119-120, 144 A. 901, 903-04 (1929) (grant of fee to county with only conditional estate to school district). Absent such exceptional circumstances or imminency, courts did not begin recognizing a right of future interest holders to share in a condemnation award until Ink v. City of Canton, 4 Ohio St. 2d 51, 212 N.E.2d 574 (1965), and State v. Independent School Dist., 266 Minn. 85, 123 N.W.2d 121 (1963).

68. *See, e.g.*, Land Clearance for Redevelopment Auth. v. City of St. Joseph, 560 S.W.2d 285, 288 (Mo. Ct. App. 1977) (holder of fee not in breach even though use no longer possible following condemnation); Lyford v. City of Laconia, 75 N.H. 220, 227-28, 72 A. 1085, 1090 (1909) (no reversion to executory interest holder so long as state public use continues); First Reformed Dutch Church v. Croswell, 210 A.D. 294, 295, 206 N.Y.S. 132, 133 (1924) (disuse occurring only after simultaneous seizure of fee and reverter through condemnation).

69. United States v. 808.40 Acres of Land, 372 F. Supp. 1165, 1166 (E.D. Ky. 1973) (fee holder innocent of breach where compliance impossible after government taking).

70. *See, e.g., id.* (intent of grantor to prevent voluntary abandonment by grantee); Gordy v. Cobb County School Dist., 255 Ga. 26, 27, 334 S.E.2d 688, 689 (1985) (found grantor's intent to have estate in property or award continue so long as any community club use carried out); State v. Rand, 366 A.2d 183, 195 (Me. 1976) (found grantor's intent to create trust rather than determinable fee from language and purposes of gift).

71. 266 Minn. 85, 95, 123 N.W.2d 121, 129 (1963).

Supreme Court of Minnesota simply stated, without elaborating, that its state constitution prohibited taking property without just compensation, the court held that the Restatement rules failed to adequately protect future interests and determined that even when a violation of the condition is not imminent, some amount, however nominal, should always be awarded to the owners of these interests.[72] The court was undaunted though the owners of the possibility of reverter had not produced any evidence of the value of their separate interest.[73] Instead, the court recognized that the award was based on the fair market value of the undivided fee as determined by the highest and best use for the property, and held that the value of the possibility of reverter was the difference between the restricted and unrestricted values of the entire fee.[74]

Two years later, in 1965, the Supreme Court of Ohio also found the Restatement rules unsatisfactory in *Ink v. City of Canton*.[75] Although this court never mentioned the just compensation clause, the opinion emulated the fairness rhetoric found throughout United States Supreme Court opinions. For example, in acknowledging the general rule that the grantee/owner of the defeasible fee is awarded the entire condemnation award, the court noted that failing to allow the owner of the future interest to share in an award based on the fair market value of the unrestricted fee could give the grantee a "windfall," especially when the grantee paid nothing for his interest.[76] The court also

---

72. *See id.* (owners of possibilities of reverter entitled to some compensation for loss of their interest in land).

73. *Id.* at 91, 123 N.W.2d at 126 (discussion of apportionment undertaken even without a prior consideration of market value of future interest).

74. *Id.* at 97-98, 123 N.W.2d at 129-30 (award based on comparison of restricted and unrestricted value plus likelihood of the abandonment of the use). The court determined:

> If the value [of restricted land], in cases where the realty would have a greater market value if devoted to some other practicable purpose, is *less* than the totality of the value, the owner of the possibility of reverter shall be entitled to a proportion of the condemnation award expressed by a fraction the denominator of which is the market value of the realty when devoted to its best practicable use and the numerator of which is the difference between such value and the value of the realty applied to the uses to which it is restricted by the terms of the deed for such period of time as such use is reasonably to be anticipated.

Id. at 130 (footnote omitted)(emphasis in original). Only when the restricted and unrestricted uses were of the same value would the owner of the future interest be entitled to only nominal damages. *Id.*

75. 4 Ohio St. 2d 51, 57, 212 N.E.2d 574, 578 (1965).

76. *See id.* at 55, 212 N.E.2d at 577 (grantee could get full value of the unrestricted fee). *Compare* United States v. 50 Acres of Land, 469 U.S. 24, 34 (1984) (increased compensation to cover replacement costs an unwarranted windfall to grantee). The *Ink* court

noted that the Restatement rules were intended to absolve the harshness of this general rule, but concluded that they did not go far enough.[77] As in *State v. Independent School District*, the *Ink* court ruled that the grantor/owner of the possibility of reverter was entitled to the difference in value between the restricted and unrestricted fee.[78] The court went further, however, and held that any award the grantee received would still be subject to the same conditions imposed upon the determinable fee.[79] These two cases prove that courts have been able to formulate "workable standards" for valuing interests other than by applying the Restatement rules or the fair market value standard.

Due to the lack of a secondary market for either defeasible fees or their respective future interests, it is unlikely that there would in fact be an ascertainable fair market value for these interests. Using the formula of the difference in value between the restricted and unrestricted undivided fee ("difference-in-value test") instead is consistent with the Supreme Court's directive that some standard other than fair market value must be used when the interest at issue has no market value or when that value is too difficult to ascertain.[80]

Although the context is different, the difference-in-value test also incorporates the Supreme Court's "windfall" criterion. In the *Duncanville* and *Lutheran Synod* cases, the Court was concerned that using some formula other than fair market value would result in a windfall to the condemnee. In future interest

---

also opined that if the grantee paid full value for the defeasible fee, giving the grantor any of the award could result in a windfall to the grantor. *See Ink*, 4 Ohio St. 2d at 55, 212 N.E.2d at 577 (grantee received less than full value originally).

77. *See Ink*, 4 Ohio St. 2d at 57, 212 N.E.2d at 578 (Restatement rule too harsh).

78. *See id.* 55, 212 N.E.2d at 577 (no justification for compensating grantee for use he never had). The court in State v. Independent School District used a fraction to obtain the same result. *Compare* State v. Independent School Dist., 266 Minn. 85, 123 N.W.2d 121, 130 (1963) (formula becomes the difference between the highest use and the restricted use divided by the market value of the highest use) *with Ink*, 4 Ohio St. 2d at 55, 212 N.E.2d at 577 (proper award is difference between values of restricted and unrestricted fee).

79. *See Ink*, 4 Ohio St. 2d at 58, 212 N.E.2d at 579 (grantee only entitled to use award for same purposes as original gift). Since only a partial condemnation was involved, the court determined that the owners of the possibility of reverter would retain their rights in both the remaining land and in the money awarded for the parcel taken. *Id.*

80. *See* United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950) (no rigid rule for just compensation determination when market value inappropriate). *See generally* 4 P. NICHOLS, *supra* note 23, at § 12.32[1] & n.4 (fact that property has no market value never a reason relied upon for not compensating).

situations however, using the fair market value of the unrestricted fee to determine the grantee's award, which was based on the fair market value of an unrestricted fee, would result in a windfall to the grantee especially if she paid nothing for the restricted estate. Even if the grantee paid for the defeasible estate, it is likely that she paid less than the fair market value for the fee since the interest was subject to a restriction. Awarding the grantee the restricted value of the fee, then, would "place [the grantee] in the same position pecuniarily as if the property had not been taken."[81] Whether the difference-in-value test in fact represents the fair market value of either the defeasible fee or the future interest does not detract from the "fairer" result or that denying the future interest holder any compensation is "very unfair" because it would result in a "windfall" to the defeasible estate owner.

b. Implied trust doctrine. As pointed out above, the *Ink* court apparently concluded that fairness required subjecting the grantee's monetary award to the same restrictions which the grantor had placed upon the determinable fee. The reason was that the grantee city had undertaken a "fiduciary obligation" to use the property only as a public park.[82] In a 1976 case, *State v. Rand*,[83] the Maine high court reached a similar result by expressly finding that the deed did not convey a fee simple determinable creating a possibility of reverter in the grantor or his heirs, but a trust with general charitable intent which permitted application of the doctrine of *cy pres*.[84] This holding, while prohibiting the possibility of reverter owner from sharing in the award, did allow the city/grantee to use the entire award to create a new park.[85]

While the *Rand* court viewed the deed as creating a trust, a year later a Missouri court combined the trust concepts with the determinable fee concept and concluded that a conveyance created a "fee in trust" in the city burdened by a possibility of reverter in the grantor.[86] The application of *cy pres* was not dis-

---

81. *See* Almota Farmers Elevator & Warehouse. Co. v. United States, 409 U.S. 470, 473-74 (1973) (owner entitled to same pecuniary position as if property not taken).

82. *See Ink*, 4 Ohio St. 2d at 58, 212 N.E.2d 574, 579 (1965).

83. 366 A.2d 183 (Me. 1976). The city/grantee received land to be maintained as a public park. The grant called for completion of the park within two years and the permanent maintenance of a plaque honoring the grantor's parents. *Id.* at 186.

84. *Id.* at 195-96.

85. *Id.* at 199.

86. *See* Land Clearance for Redevelopment Auth. v. City of St. Joseph, 560 S.W.2d

cussed, however, and the city was given the entire award apparently unencumbered.[87] In 1985, the Supreme Court of Georgia cited the *City of St. Joseph* and the Restatement in *Gordy v. Cobb County School District*[88] in ruling that the grantee was entitled to the entire award for the partial condemnation.[89] Although the trust issue was not discussed, the court still ruled, in a footnote, that the award would be subject to the possibility of reverter if either the money or the remaining land was used contrary to the conditions.[90]

As with remainders and reversions, the implied trust doctrine has been used in the future interest context to allocate the initial award even though the interest being condemned was not held in trust.[91] Similarly, a determination that a trust was created in the original conveyance should not be a prerequisite to determining that the award granted to the owner of a defeasible fee should be subject to the same conditions. Courts are evidently predisposed to finding a trust and then applying trust principles in order to provide themselves with a set of neatly-packaged rules for obtaining a fair result.

In order to take advantage of this packaging, courts have had to stretch both the law and the facts. For example, in *Rand*, the court dismissed the generally successful argument that the presence of a reverter clause negates general charitable intent by finding that the reverter clause in the deed at issue applied only to a time requirement and not to the condition of maintaining a park.[92] In *Hamman v. City of Houston*,[93] the court held a trust

---

285, 287 (Mo. Ct. App. 1977) (held property as defeasible fee in trust subject to possibility of reverter if use abandoned).

87. *See id.* at 289 (remanded for lower court to distribute total award to city). The heirs did assert that they were entitled to the award since the grantor did not intend to dedicate the property to public use indefinitely. *Id.* at 286. *See also* Hamman v. City of Houston, 362 S.W.2d 402, 405 (Tex. Civ. App. 1962) (partial condemnation case in which city was entitled to entire award subject to restrictions of original trust).

88. 255 Ga. 26, 334 S.E.2d 688 (1985).

89. *See id.* at 27, S.E.2d at 689 (affirming award of entire compensation to grantee).

90. *Id.* at 27 n.1, 334 S.E.2d at 689 n.1.

91. *See supra* notes 55-56 and accompanying text (discussing awards to remaindermen).

92. *See Rand*, 366 A.2d at 195 n.20 (placement of language indicating intent for reversion only if park not completed within two year period). Under the law of trusts, courts may use the doctrine of *cy pres* to carry out the general charitable intent of a testator if the particular charitable purpose specified in the will fails for any reason. Since the testator has not ordinarily foreseen the impossibility of the gift, the court must find some indication of what general charitable alternative the testator might have approved if the problem was contemplated. *See* 4A A. SCOTT, THE LAW OF TRUSTS § 399.2

was created without specifically finding the necessary charitable intent and despite a reverter clause.[94] That court also cited cases which did not discuss trusts but rather defeasible fees.[95]

The courts' penchant for such doctrinal grab-bagging is not limited to this area of the law.[96] However, on the question of compensating future interest owners, courts should overtly emphasize allocating a condemnation award in a manner which complies with the dictate of the fifth amendment instead of contorting or avoiding trust principles. Giving the entire award to the defeasible fee owner is unfair because, as discussed above, it gives the owner a windfall. Failing to award the defeasible fee owner any money, however, would ignore that he was the owner of the taken property.

Subjecting an award granted to the owner of the defeasible fee to the conditions of the initial grant satisfies the just compensation clause, not because it complies with trust principles, but because it indemnifies the condemnee while avoiding "mani-

---

(4th ed. 1988). When the donor has made provisions in the event the specified purpose cannot be fulfilled, the doctrine of *cy pres* is inapplicable. An express alternative generally indicates testator's intent to provide only for specific charitable purposes rather than to leave the general charitable gift needed to invoke cy pres. *Id.*

93. 362 S.W.2d 402 (Tex. Civ. App. 1962).

94. *Id.* at 404-05 (negating heir's assertion of grant of easement but calling grant a trust rather than defeasible fee). There must be a particular intent to confer benefits through the medium of a trust and not through some related or similar device. *See* 1 A. SCOTT, *supra* note 92, at § 23 (express trust created only where settlor clearly intends trust relationship). Many cases have determined a trust was created without analyzing the conveying document. *See, e.g.*, Pedrotti v. Marin County, 152 F.2d 829, 830 (9th Cir. 1946) (discussing testator's grant as trust without construing language of will as to form of grant), *cert denied*, 328 U.S. 853 (1946). *But see Rand*, 366 A.2d at, 195 (determination of grant as trust or conditional gift dependent on finding testator's intent from construction of will).

95. *Hamman*, 362 S.W.2d at 405 (failure of use due to taking is not an event causing reverter when land held is as defeasible fee). The court cited First Reformed Dutch Church v. Croswell, 210 A.D. 294, 206 N.Y.S. 132 (1924) and Romero v. Department of Public Works, 17 Cal. 2d 189, 109 P.2d 662 (1941). Both of these cases simply followed the Restatement rules. *See supra* notes 62-66 and accompanying text discussing the Restatement position. *See also* Comment, *The Effect of Condemnation Proceedings by Eminent Domain Upon a Possibility of Reverter or Power of Termination*, 19 VILL. L. REV. 137, 154-55 & n.110 (1973) (discussing erroneous use of authority in *Hamman*).

96. *See* Michelman, *supra* note 6, at 1249 (discussing emergence of rules a judge may use to justify decision he deems fair). Michelman states:

> If the rules cannot always *guide* a sentient judge to his decision, they may still render good service as props to imbue that decision with the appearance of ordinariness and impersonality, thereby enabling the judge to decide the "correct" issue (that of fairness) without being intolerably dictatorial and smug about it.

Id. at 1249-50 (emphasis in original).

fest injustice" and the possibility of a windfall. In other words, an award subject to the original grant's conditions is fair.

Ambiguity arises when deciding whether restricting the entire award (based upon the unrestricted fair market value) is more fair than restricting only the difference in value between the restricted and unrestricted fee. Which is more fair? Subjecting the entire award to the restrictions imposed in the deed gives the grantee no more than he had before. However, the difficulty arises when the grantee attempts to reinvest the money in a manner which complies with the restrictions. Due to the problems involved in finding and assessing replacement properties, this option is disfavored with other types of future interests.[97]

In a partial condemnation case, the award could easily be applied towards the upkeep or expansion of the remaining property.[98] A workable rule would give the grantee the entire award, subject to the conditions in a partial condemnation case, but would split the award based upon the difference in value between the restricted and unrestricted fee in a total condemnation case.[99]

It is not suggested that the rules outlined above should be determinative in all cases of condemnation of a fee simple defeasible. In all takings cases, the just compensation question should be directly responsive to the fairness and indemnity dictate of the fifth amendment rather than to a predetermined standard. The unquestioned equating of just compensation with the Re-

---

97. *See supra* note 58 and accompanying text.

98. *See* Gordy v. Cobb County School Dist., 255 Ga. 26, 27 n.1, 334 S.E.2d 688, 689 n.1 (1985) (restricting use of condemnation award to grantor's original purpose). In partial condemnation cases, the award given would obviously be based only on the property taken, *i.e.*, the restricted value of that property. If the grantee fails to use the award for the remaining property, the grantor would be entitled to the money. *See* Ink v. City of Canton, 4 Ohio St. 2d 51, 58-59, 212 N.E.2d 574, 579 (1965) (grantee entitled to restricted use of award fund based on restricted value of property with excess based on unrestricted use awarded to holders of reverter).

99. *Compare Ink*, 4 Ohio St. 2d at 58-59, 212 N.E.2d at 579 (award to grantee subject to same conditions as remaining property) *with* State v. Independent School Dist., 266 Minn. 85, 97-98, 123 N.W. 2d 121, 130 (1963) (court using formula to split award according to restricted and unrestricted value of fee). Fairness would also require giving the grantee the value of any improvements. *See* City of Laurel v. Powers, 366 So.2d 1079, 1084 (Miss. 1979) (listing compensation for improvements in the damage award). *See generally* Durham, *supra* note 6, at 1305 (improvements compensable since directly provable in monetary terms); Francis, *Eminent Domain Compensation in Western States: A Critique of the Fair Market Value Model*, 1984 UTAH L. REV. 429, 432 (discussing Supreme Court awards of compensation for improvements).

statement's test fails to address this constitutional query. In future interest cases, it would be appropriate for evidence on the difference in values, consideration paid, and the effect of a partial taking on the restriction to be presented to a jury which will have the ultimate task of determining a fair award.[100]

c. The Mississippi approach. The Mississippi Supreme Court has been adamant in promoting fairness rather than the Restatement's test or the fair-market-value standard. In a 1962 case, *Hemphill v. Mississippi State Highway Commission*,[101] the supreme court established a two-prong test for compensating future interest owners. First, the future interest owner "must be the owner of a compensable interest in the condemned property." [102] On this question the court established that future interests are compensable. The second prong requires that the "interest must be capable of valuation."[103] Although the *Hemphill* court did not reach the value question, it did direct that the value of a future interest be determined by the fact finder based on appropriate evidence.[104] In a subsequent case, *Columbus & Greenville Railway Co. v. City of Greenwood*,[105] the Mississippi Supreme Court approved an allocation of $100,000 of a $150,000 condemnation award to the owner of a possibility of reverter which apparently represented the difference in the value of the restricted and unrestricted fee.[106] In reaffirming that the compensation question should be determined by the fact finder and not the Restatement's test, the court cited *Hemphill* for the proposition that "[t]he jury apparently accepted testimony of an expert appraiser. Although the trier of facts was not obliged to accept that particular evidence, it could weigh that and other testimony in reaching an acceptable conclusion as to the quantum of damages."[107]

---

100. Statutes limiting the duration of certain future interests should also be considered. *See* CONN. GEN. STAT. § 45-97 (1977) (conditional fee becoming absolute if contingency not occurring within thirty years). *See also* ILL. ANN. STAT. Ch. 30 para. 37e (Smith-Hurd 1969) (possibility of reverter valid only for forty years).

101. 245 Miss. 33, 145 So. 2d 455 (1962).

102. *See id.* at 44-51, 145 So. 2d at 460-64 (denial of compensation for future interests not equitable and not consistent with related legal principles). The court rejected authorities, including the Restatement, which viewed future interests as not being vested rights and therefore non-compensable. *Id.* at 50-51, 145 So. 2d at 463.

103. *Id.* at 52, 145 So. 2d at 464.

104. *Id.*

105. 390 So. 2d 588 (Miss. 1980).

106. *Id.* at 592.

107. *Id.* (quoting *Hemphill*).

While the Mississippi Supreme Court has recognized the unfairness of the Restatement's test, the court still focuses on value rather than directly on the fairness and indemnity dictate of the fifth amendment. As noted earlier, since a secondary market for possibilities of reverter is unlikely, there is in fact no fair market value. The Mississippi Supreme Court, however, has escaped the strangle hold of the fair-market-value standard or the Restatement's test by recognizing that value could be based on other evidence. The court approved the result in *Greenwood* because giving the "entirety of the $150,000 eminent domain proceeds" to the owner of the defeasible fee "would be unconscionable and contrary to all rules of fairness."[108] Therefore, although the fairness and indemnity requirement of the fifth amendment is not overtly presented to the jury, the court has refused to allow it to be subsumed by predetermined rules on value.

C. Application of the Difference-In-Value Test

In a recent Texas Supreme Court case, *Leeco Gas & Oil Co. v. County of Nueces*,[109] the court made a valiant effort to avoid treating the Restatement test as the talisman for compensating the owner of a possibility of reverter. Its efforts fell short in the end, however, because the court simply latched onto the *Ink* difference-in-value test despite the significant factual differences between the two cases.

In *Leeco*, Leeco deeded property to the county as a gift "so long as" the county maintained it as a public park.[110] This grant created a fee simple determinable in the county and a possibility of reverter in Leeco. Subsequently, the county commenced condemnation proceedings to take Leeco's interest for a public use. In affirming a commissioner's award of ten dollars for Leeco's interest, the Texas Court of Appeals relied solely on the Restatement test as representing the "logically sound" majority rule.[111] The appellate court made no mention of the constitutional requirement of just compensation. Instead, it relied on testimony that the possibility of reverter had no market value.[112]

On appeal, the Texas Supreme Court agreed with the lower

---

108. *Id.*

109. 736 S.W.2d 629 (Tex. 1987).

110. *Id.* at 630 (deed to county so long as park constructed and maintained).

111. Leeco Gas & Oil Co. v. County of Nueces, 716 S.W.2d 615, 619 (Tex. Ct. App. 1986) (value of reversionary interest too speculative), *rev'd*, 736 S.W.2d 629 (Tex. 1987).

112. *See id.* (no evidence of imminent reversion).

court's determination that the county was not estopped from condemning due to the gift deed.[113] In reversing the valuation question, however, the supreme court noted that even if the Restatement test were to control, reversion could be considered "imminent" since the evidence showed that the condemnation was "an attempt by the county to remove the 'burden' of the reversionary interest by condemning the interest and paying nominal damages."[114] Another concern which influenced the court was the possible adverse impact on gifts of real property to governmental bodies.[115] The court also found that ten dollars was not adequate and held that the difference-in-value test established in *Ink v. City of Canton* would provide the measure of compensation required to be paid by a governmental entity that condemns the possibility of reverter created in a gift deed to that entity.[116]

The *Leeco* opinion represents only a partial victory for the fairness and indemnity dictate of the fifth amendment over the fair-market-value standard or the Restatement's imminency test since the court ultimately falls prey to the lure of the neatly packaged difference-in-value rule. This rule was formulated in cases involving the condemnation of the entire fee simple determinable as well as the possibility of reverter. In those cases, a condemnation award was formulated on the basis of the unrestricted fee, and the remaining question was how to allocate the award between the owner of the determinable fee and the owner of the possibility of reverter.[117] Those cases did not involve the condemnation of a possibility of reverter at the behest of the governmental body which was given the determinable fee in the same tract of land.[118] The Texas court recognized these differences but still ruled that the *Ink* test applied.

---

113. *Leeco*, 736 S.W.2d at 630 (exercise of governmental power not subject to estoppel).

114. *Id.* at 631 (county official testifying to future plans which were inconsistent with deed restrictions).

115. *Id.*

116. *See id.* at 631-32 (excess value of unrestricted fee over restricted fee constituting proper compensation).

117. *See* Ink v. City of Canton, 4 Ohio St. 2d 51, 58-59, 212 N.E.2d 574, 579 (1965) (compensation for unrestricted property value subject to division among interest holders). *See also* State v. Independent School Dist., 266 Minn. 85, 93, 123 N.W.2d 121, 127 (1963) (proper distribution of condemnation award left to court determination).

118. For cases involving the converse situation, see Rogers v. State Roads Comm'n, 227 Md. 560, 567-68, 177 A.2d 850, 854 (1962) (condemnor owned benefits under restrictive covenant which reduced value of condemned property for compensation purposes)

The *Leeco* court also recognized that reversion could be considered imminent, which was not true in *Ink*. If the land had reverted, Leeco would have owned it in fee and the fair-market-value standard would require paying the unrestricted value.[119] Instead, the county was allowed to obtain an unrestricted fee simple interest by paying only the difference in value between the restricted and unrestricted fee, while Leeco lost its reverter rights and possibly any consideration which motivated it to make the initial gift.[120] According to the United States Supreme Court, this results is an unfair windfall to the government.

D. Demoralization Costs and Fiscal Illusion: Considerations in Determining Just Compensation

The donee/condemnor facts of *Leeco* also inflicted demoralization costs which were absent in the *Ink* case. The Texas Supreme Court apparently recognized the role of demoralization costs as a factor in determining just compensation in its concern for the negative impact upon gifts of property to governmental entities.[121] In the donee/condemnor situation, the question becomes whether paying the restricted value to the owner of the possibility of reverter, rather than the unrestricted fair market value, would quiet the grantor/possibility of reverter owner's unease about being strategically exploited by the government's decision to condemn the grantor's interest after accepting a gift from the grantor.[122] Requiring the condemnor to pay the un-

---

and State v. Callahan, 242 Or. 551, 410 P.2d 818, 820 (1966) (compensation limited to restricted value even where state owned possibility of reverter).

119. *See Leeco*, 736 S.W.2d at 631 (where condemnor has no present interest in the property actual damages must be paid as compensation).

120. *See id.* at 632 (Campbell, J., concurring) (condemnation inconsistent with grantor's intended purpose). It is not clear what consideration Leeco received when it made the gift. Consideration in these cases could range from tax benefits, to benefits conferred on adjoining land, or frequently the strokes given to the grantor's ego when he gives land to be used as a park bearing his name. *Cf. Ink*, 4 Ohio St. 2d at 57-58, 212 N.E.2d at 578 (no consideration paid by grantee other than duty to maintain park bearing grantor's name); Romero v. Dep't of Pub. Works, 17 Cal. 2d 189, 196, 109 P.2d 662, 666 (1941) (consideration was retention of benefits). The *Romero* court stated: "[W]hen the state deprived the plaintiffs of their reversionary interest in said 60-foot strip, it took from them not merely a naked reversionary title, but what may be considered a substantial benefit retained by the grantor of said strip, which benefit was the consideration for the grant. . . ." *Id.*

121. *See Leeco*, 736 S.W.2d at 631 (nominal damages not in best interests of state's citizens). *See also* Michelman, *supra* note 6, at 1213-14 (discussing the impact of demoralization costs).

122. *See* Michelman, *supra* note 6, at 1217.

restricted fair market value insures that the government will not take advantage of the ownership position created in it by the gift.[123]

Another factual difference between *Leeco* and *Ink* which would require a different rule of compensation is the heightened opportunity for the fiscal illusion phenomenon in the donee/condemnor situation. In *Leeco*, the county commissioners were aware that condemnation is based on fair market value and that under this standard the possibility of reverter owned by Leeco would be virtually worthless. The weak testimony by public officials about future plans for the land fairly raised the question whether the county was actually motivated by the extremely low cost or the need to obtain the property on the behalf of the public.[124] The court summarized the situation as one in which the county attempted to obtain something for nothing.[125] If the county had not received the restricted fee as a gift and the land

---

123. See *Leeco*, 736 S.W.2d at 631 (county undermining restrictions by condemnation without proper compensation). The donee/condemnor situation is reminiscent of cases in which a city attempted to restrict value by rezoning before condemning. *See, e.g.*, Hager v. Louisville & Jefferson County Planning & Zoning Comm'n, 261 S.W.2d 619, 620 (Ky. Ct. App. 1953) (designation of land as ponding area merely guise to avoid proper taking); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 551-53, 193 A.2d 232, 239-40 (1963) (restriction of land to uses for which it is unsuitable merely froze land for future flood control without taking); Miller v. City of Beaver Falls, 368 Pa. 189, 194, 82 A.2d 34, 37 (1951) (designation as possible park amounted to taking by contingency). In one case, a city attempted to remove restrictions on its use of the grant by conveying the property to a separate city agency. The court recognized this action as an attempt by the city to gain unrestricted use of the property without eminent domain procedures or just compensation. City of Laurel v. Powers, 366 So. 2d 1079, 1083 (Miss. 1979). *See generally* Sax, *supra* note 5, at 46 (discussing common attempts to reduce takings costs). As Justice Powell noted in his concurrence in Almota Farmers Elevator & Warehouse. Co. v. United States, 409 U.S. 470, 480 (1973) (Powell, J., concurring), the government will not be permitted to affect value through the use of "salami tactics." Similarly, the Supreme Court of Georgia noted that "condemning authorities may not cynically play 'Parcheesi' with condemnation procedures to accomplish ends that they might not accomplish without manipulation of those procedures." Department of Transp. v. City of Atlanta, 255 Ga. 124, 142, 337 S.E.2d 327, 341 (1985).

124. *See Leeco*, 736 S.W.2d at 631 (testimony given that fee restrictions limited needed park development including income producing activities). At the condemnation hearing itself, two Nueces County officials testified that the county planned to "develop a marine-world type of park which would generate income for the county and grant drainage easements to Padre Island Development Company, provide service stations, carnivals and car washes . . . ." Application for Writ of Error at 7, Leeco Gas & Oil Co. v. County of Nueces, 736 S.W.2d 629 (Tex. 1987) (No. C-5950). While not necessarily inconsistent with the use of the land as a park, the proposed activities would clearly violate the conditions of the deed. *See Leeco*, 736 S.W.2d at 631.

125. *See id.* (describing nominal compensation as inadequate and an attempt by the county to unburden itself).

was needed for a public use, the county would have had to figure the fair market value of the unrestricted fee into its cost/benefit analysis in making the condemnation decision. Only if that value is used in the donee/condemnor situation will just compensation provide the needed safeguard against unnecessary use of the eminent domain power.

The *Leeco* case provides a microcosm for viewing the role that demoralization costs and the fiscal illusion phenomenon should play in determining just compensation as well as the role that overzealous attachment to predetermined rules or standards currently plays. The case also illustrates the increased role of just compensation in all takings cases due to the newly-neutered status of the public use requirement. As the Texas Supreme Court noted, the county commissioners did not have a hardened notion about the use of the taken property, and it simply appeared the county wanted to remove the restriction by paying nominal damages. Yet under state statutes and general public use doctrine, the Texas courts had no problem in deciding that this taking was for a public use.[126] Just compensation, then, was left as the only protection against eminent domain abuse by the governmental entity.

Although the court did not overtly rely on the fifth amendment's fairness and indemnity dictate, it was obviously guided by the unique equities of the donee/condemnor situation. Assuming that the just compensation question had to be answered with a predetermined standard, as the court ultimately decided, requiring payment of the unrestricted fair market value would be the best response when the government condemns the possibility of reverter in land it received as a gift. In general, however, if just compensation is going to fulfill its role as the final protection against governmental abuses of private property, the equities suggested by the facts of the particular case, and not predetermined rules, should determine just compensation.

IV. The Goldberg-Unumb Article And The Condemnation Clause

Putting aside for the moment the question about how just compensation should be decided, the fact is that currently it is decided with the fair-market-value test in general, and with the

126. *See Leeco*, 716 S.W.2d at 618 (better utilization of park facilities sufficient public purpose for taking).

Restatement test or the difference-in-value test in the case of possibilities of reverter. A property owner may be able to avoid the application of these "default rules" with an *ex ante* condemnation clause.[127] In a recent article, Professors Goldberg and Merrill, and Daniel Unumb discuss the use of this clause in another form of divided ownership, landlord and tenant.[128] The authors do not take issue with the fair-market-value standard but suggest that in dividing that award, the sum of the parts should always equal the value of an undivided fee simple and urge the use of condemnation clauses in determining the apportionment.[129] In considering their suggestions in the context of future interests, they focus on *Ink v. City of Canton* and conclude that the approach used in that case is an "invitation to disaster."[130] In reaching their conclusion, the authors commit the now familiar sin of equating just compensation with fair market value rather than with the fairness and indemnity dictate of the fifth amendment.

In *Ink*, the court was faced with the question of how to divide an award, which was based upon the value of the undivided fee, between the owners of the determinable fee and the possibility of reverter.[131] The court determined that fairness and not value should dictate the result. Goldberg, Merrill, and Unumb state the truism that neither interest has a market and therefore the ex post fair market value of the parts would not add up to the market value of the unrestricted fee simple.[132] They decide that due to this inability to value the interest, as well as administrative and tax reasons, the entire award should go to the owner of the determinable fee.[133] Instead of considering whether

---

127. *See* Goldberg, Merrill & Unumb, *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. REV. 1083, 1087 (1987) (division of condemnation award predetermined by agreement in instrument).

128. Id.

129. *Id.* at 1132 (favoring condemnation agreements to apportion value of undivided fee).

130. *Id.* at 1133.

131. *See* Ink v. City of Canton, 4 Ohio St. 2d 51, 58, 212 N.E.2d 574, 579 (1965) (portion of the award representing difference between unrestricted and restricted uses payable to grantor).

132. *See* Goldberg, Merrill & Unumb, *supra* note 127, at 1133-34 (attempts at valuation erroneous). The authors erroneously read the *Ink* opinion as purely an attempt to value the present and future estates rather than as a fairness approach to the just compensation question.

133. *Id.* at 1135 (difficulties of division justify total award to grantee).

this result is fair, they criticize the *Ink* court's consideration of fairness as providing no answer to the valuation question.[134] Their myopic approach is disastrous because it ignores the United States Supreme Court's specific directive that when market value is too difficult to ascertain, some other method of valuation must be used as well as the general notions of fairness and indemnity inherent in the just compensation requirement. This approach renders the just compensation question responsive to procedural and valuation concerns rather than the Constitution.

The authors do recognize that the ideal solution to the problem of apportionment would be to use a condemnation clause in the granting instrument.[135] It would likely be the grantor's prerogative to do so since determinable fees are usually created by gift rather than contract. Unfortunately, however, they mistakenly conclude that the Rule against Perpetuities would bar the use of such a clause when the grantor creates a determinable fee in the grantee.[136] When such an estate is created in the grantee, the grantor retains a possibility of reverter.[137] The authors erroneously characterize the interest of the heirs as a possibility of reverter. The possibility of reverter creates no interest in the heirs of the grantor although they stand to inherit it from him.[138] The Rule against Perpetuities does not affect a possibil-

---

134. *See id.* at 1134 n.119 (advocating focus on fair market value over fairness standard).

135. *Id.* at 1134.

136. *Id.* at 1134-35. The authors are correct in stating that clauses are "rarely" encountered in this area. *Id.* at 1134.

137. *See* T. BERGIN & P. HASKELL, *supra* note 53, at 58 (possible termination of grantee's estate leaves possibility of reverter in grantor). Bergin and Haskell state: "A possibility of reverter is the future interest a transferrer keeps when he transfers an estate whose maximum potential duration equals that of the state he had to start with and attaches a special limitation that operates in his own favor." *Id.* (footnote omitted). *See generally* RESTATEMENT OF PROPERTY § 154 (1936) (defining possibility of reverter); L. SIMES, *supra* note 53, at 28-29 (possibility of reverter arising in grantor from grant of determinable fee).

138. *See* T. BERGIN & P. HASKELL, *supra* note 53, at 59 (possibility of reverter inheritable by devise or descent). The authors conclude:

> Possibilities of reverter are transferable *inter vivos*. If the owner of a devisable and inheritable estate grants that estate on special limitation, the possibility of reverter that the grantor keeps may pass by will to his devisees or by the laws of intestacy to his heirs. Like the reversion, the possibility of reverter is an interest that is retained by the transferor at the time it is created. A possibility of reverter that is transferred after its creation generally continues to be called a possibility of reverter no matter how or to whom it passes.

Id. (footnote omitted) (emphasis in original).

ity of reverter.[139] Therefore, if the grantor inserted a clause that clearly made condemnation an event causing reverter, the Rule would not invalidate this right.[140] If the grantor dies, the possibility of reverter passes to the heirs but is still immune to the Rule against Perpetuities in their hands.[141] Since the Rule against Perpetuities does apply to executory interests, a clause which attempted to give the award to someone other than the grantor would be subject to the Rule.[142] A grantor contemplating a restricted gift should clearly state that condemnation will result in a reversion to avoid the likely application of default rules which favor the grantee.

V. CONCLUSION

Holmes' admonition that courts refrain from blindly imitating the past was designed to encourage the abolition of rules of law when history revealed their obsolescence. The corollary he offered was that when the ends have been defined and remain relevant, the rules should clearly and articulately refer to that end.[143] While the Supreme Court has repeatedly recognized the

---

139. *See id.*, *supra* note 53, at 179 (certain future interests not subject to Rule). "For reasons which are more historical than rational, [the Rule against Perpetuities] was not made applicable to the possibility of reverter or the right of entry." *Id.* (footnote omitted). The authors correctly note in a footnote that the Rule does apply to executory interests but not to possibilities of reverter. Goldberg, Merrill & Unumb, *supra* note 126, at 1135 n.20. *See generally* RESTATEMENT OF PROPERTY ch. 4 intro. (1936) (Rule applying to executory interests but not possibility of reverter); L. SIMES, *supra* note 53, at 279-80 (possibility of reverter not subject to Rule). However, the authors confuse the ownership of that estate as being in the heirs rather than the grantor. Goldberg, Merrill & Unumb, *supra* note 127, at 1134-35 & n.20.

140. The authors note that due to courts' penchant for rules of construction to avoid forfeiture, clauses should clearly state the effect of condemnation. Goldberg, Merrill & Unumb, *supra* note 127, at 1121 (clauses in condemnation of leasehold). Courts have reached different conclusions when the granting instrument simply provided that a sale would cause a reverter. *Compare* United States v. 726.23 Acres of Land, 746 F.2d 1363, 1365 (8th Cir. 1984) (rejected argument that condemnation affected a sale) *with* Pedrotti v. Marin County, 152 F.2d 829, 831 (9th Cir. 1946) (equated condemnation with a sale thus causing reverter). *See also* United States v. 808.40 Acres of Land, 372 F. Supp. 1165, 1166 (E.D. Ky. 1973) (did not find clear intent that condemnation caused reverter).

141. *See* sources cited *supra* note 139.

142. *See* discussion of Rule against Perpetuities as applicable to executory interests *supra* note 137. Executory interests are created in someone other than the grantor. *See* C. MOYNIHAN, *supra* note 54, at 197 (executory interest never created in transferrer); L. SIMES, *supra* note 53, at 25 (executory interest always in grantee).

143. Holmes, *supra* note 1, at 469. "Still it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." *Id.* 142.

historically enduring end of just compensation as one of fairness and indemnity, it has also permitted blatant deviations from that end through strict adherence to its fair-market-value standard. The future interest cases illustrate the need to ensure that just compensation is directly responsive to the fifth amendment by directly addressing its dictate rather than detouring through objective standards which stress valuation rather than fairness. This approach would permit the consideration of many significant factors which are currently ignored, such as demoralization costs and fiscal illusion, thus enabling the just compensation mandate to compensate for the neutered status of the public use requirement. The inherently amorphous nature of this approach can be adequately structured with proper jury instructions as well as the continued use of specialized statutes.[144] The usual objections to any fairness approach, however, lose cogency when the just compensation requirement is viewed, as it currently must be, as the final protection against governmental abuses of private property.

144. *See, e.g.*, 42 U.S.C. §§ 4622 to 4624 (1982) (moving expenses and supplemental payments for displaced owners and tenants); TENN. CODE ANN. §§ 13-11-105 to 107 (1987) (compensating relocation expenses); VA CODE ANN. §§ 25-239 to 25-241 (1985) (prescribing separate awards for relocation and home acquisition costs) or for special incidental losses, *compare* CAL. CIV. PROC. CODE §§ 1263.510 (Deering 1981) (requirements for compensating loss of business goodwill) *with* FLA. STAT. ANN. §§ 73.071 (West 1987) (permitting compensation in partial takings for incidental losses to businesses over five years old).